No. 838

In the Supreme Court of the United States

OCTOBER TERM, 1944

H. G. HOUSE, PETITIONER

v.

UNITED STATES OF AMERICA, LENA ENGLAND FOX, WANDA HIGHLAND COBBS, BERNICE MARIE RAY NEFF, NOW DOWNING, EXECUTRIX, ETC., BY HER LEGAL GUARDIAN, J. L. COBBS, AND [illegible], UNMARRIED

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617501—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 628

H. G. HOUSE, PETITIONER

v.

UNITED STATES OF AMERICA, LEONA RICHARD FOX, WANDA RICHARD CURTIS, FLORENCE MARIE BARNETT, NOW TOWNSEND, GEORGE BARNETT, JR., BY HIS LEGAL GUARDIANS, GEORGE BARNETT AND J. L. CORBIN, AND RINA RICHARD HOWELL, NOW URQUHART

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 1429–1439) is not yet reported. The views of the district court are embodied in its findings of fact and conclusions of law (R. 92–102, 448–482, 510–512).

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered on August 25,

1944 (R. 1439). The petition for rehearing was denied on September 21, 1944 (R. 1448). The petition for a writ of certiorari was filed on October 23, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Superintendent for the Five Civilized Tribes of Oklahoma may release to a full-blood Indian his restricted money without obtaining authority from the Secretary of the Interior or the Commissioner of Indian Affairs and without determining whether particular releases benefit the Indian.

2. Whether the United States may recover the amount of restricted oil royalties taken from an Indian with notice that the funds were illegally released.

STATUTES AND REGULATIONS INVOLVED

Section 1 of the Act of May 27, 1908, 35 Stat. 312, provides in part:

> That * * * all allotted lands of enrolled full-bloods * * * shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance * * * except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and

> disposal of the proceeds for the benefit of the respective Indians as he may prescribe. * * *

Section 2 of the Act of May 27, 1908, 35 Stat. 312, provides in part:

> That all lands other than homesteads * * * from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided,* That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise.
>
> * * * * *

Section 18 of the Act of February 14, 1920, 41 Stat. 408, 426, provides in part:

> For expenses of administration of the affairs of the Five Civilized Tribes, Oklahoma, and the compensation of employees, $195,000: *Provided,* That a report shall be made to Congress by the Superintendent for the Five Civilized Tribes through the Secretary of the Interior, showing in detail the expenditure of all moneys appropriated by this provision: *Provided further,* That

> hereafter no undisputed claims to be paid from individual moneys of restricted allottees, or their heirs, or uncontested agricultural and mineral leases (excluding oil and gas leases) made by individual restricted Indian allottees, or their heirs, shall be forwarded to the Secretary of the Interior for approval, but all such undisputed claims or uncontested leases (except oil and gas leases) heretofore required to be approved under existing law by the Secretary of the Interior shall hereafter be paid, approved, rejected, or disapproved by the Superintendent for the Five Civilized Tribes of Oklahoma: *Provided, however,* That any party aggrieved by any decision or order of the Superintendent for the Five Civilized Tribes of Oklahoma may appeal from the same to the Secretary of the Interior within thirty days from the date of said decision or order.

Sections 183.20 and 221.2 of Title 25, Code of Federal Regulations, provide:

> 183.20. *Disposition of income from leases.* All royalties, rents, or payments accruing under any lease shall be deposited by the Superintendent to the credit of the Indian lessor entitled to the same. Such income belonging to any minor or other Indian under local guardianship shall be held by the Superintendent or such other officer as may be designated by the Secretary of the Interior to the credit of the guardian (or

curator) of such minor or other Indian under local guardianship, and shall be paid to such guardian (or curator) upon voucher executed by him and approved by the judge of the county (probate) court having jurisdiction of the estate of such minor or other Indian under local guardianship (the form of such voucher to be prescribed by the Department), or upon authority of such court in the form of an order satisfactory to said Superintendent or other officer in charge of the office of the Superintendent for the Five Civilized Tribes. The said Superintendent is authorized, however, in his discretion, where considered for the best interest of any adult, minor, or incompetent lessor, or his or her heirs, for whose account royalties, rents, or payments accruing under any lease have been paid to said Superintendent to withhold the disbursement of such royalties, rents, or payments, wholly or in part, from any such adult or guardian or curator of any such minor or incompetent, or his or her heirs, until such time or times as the payment thereof is considered best for the benefit of said lessor or his or her heirs; *Provided,* That in such individual cases or classes of cases as the Secretary of the Interior may direct, the Superintendent shall cause such payments as may be authorized to be made out of the royalties and other individual Indian funds of the restricted Indians, minors, and

incompetents, to be paid direct to the Indians, entitled thereto or to be otherwise paid out for their benefit and use, as the Secretary of the Interior may authorize in said cases.

From the individual Indian restricted funds derived as royalties or otherwise, no disbursements in the settlement of litigation or in payment of attorney's fees or in the purchase of or investment in real estate or in loans upon real estate shall be made except with the approval of the Secretary of the Interior thereto: Provided, however, That nothing in this section shall be construed as limiting or affecting the jurisdiction of the Superintendent as authorized by certain provisions of the Act of Congress approved February 14, 1920 (41 Stat. 408). [This was Section 25, as amended, of the 1908 Regulations of the Secretary of the Interior.]

221.2 *Authority.* Requests for authority to draw checks against individual money should be made in triplicate on Form 5–139, carefully prepared for the approval of the Commissioner of Indian Affairs except that the date of approval and the number should be left blank. All requests for authority must show clearly the necessity for the proposed expenditure and, where it is intended to pay directly to the depositor for unrestricted use, his competency to handle without supervision the

> amount requested. [This was Section 2 of the 1913 Regulations of the Secretary of the Interior.]

Section 29 of the "Regulations [of the Secretary of the Interior] Governing The Leasing And Removal of Restrictions on Land of Members of The Five Civilized Tribes," approved July 7, 1925 (R. 456, 1435) provides in part:

> For interpretation of the above-quoted provision of the act of February 14, 1920, see opinion of November 4, 1921, of the Solicitor for the Department of the Interior as contained in his letter of that date to the Secretary of the Interior [41 Stat. L. 408–426].

STATEMENT

This proceeding was instituted by the heirs of Eastman Richard, a full-blood Creek Indian, against petitioner in the District Court of Muskogee County, Oklahoma, to obtain an accounting from petitioner, as a fiduciary, of funds handled by petitioner from 1924 to the date of Richard's death in 1934. Notice of the pendency of the action was served on the Superintendent for the Five Civilized Tribes and the case was removed to the federal district court under the provisions of the Act of April 12, 1926, 44 Stat. 239. The Government intervened, alleging that the suit involved restricted funds of Richard. (R. 92–93.)

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The material facts, as found by the trial court, may be summarized as follows: Prior to 1924, with the approval of the Department of the Interior, there had been released to Richard $1,300,000 of his restricted oil royalties. In June 1924, Richard was heavily indebted to various persons, and the petitioner, under a contract with the Indian, undertook to represent the latter in negotiations with the Department of the Interior to settle these debts. Settlement of the indebtedness in the sum of $117,000 was made in February 1925, with Departmental approval. (R. 96, 1094.)

Petitioner was "an unusually shrewd business man, trained not only in business but in law"; Richard was illiterate, "unable to read or write in any language except he was able to sign his name" (R. 100).

On November 2, 1925, petitioner procured from Richard a letter which was transmitted to the Superintendent of the Five Civilized Tribes and which requested the Superintendent to send all Richard's mail and checks to Post Office Box 1453, Muskogee, Oklahoma, which was the post office box of petitioner (R. 98, 1403–1404, 1432). On November 9, 1925, petitioner procured a second contract from Richard under which the former was to manage the Indian's affairs; in return, petitioner was to receive fifteen percent of the Indian's income, including his royalties (R. 457). This contract was never approved by the Secretary of the Interior

On the same day, the Superintendent of the Five Civilized Tribes at Muskogee, Oklahoma, made an initial release of Richard's restricted funds in the amount of $18,000 (R. 1425), and from that time forward until Richard died in 1934, all of his restricted royalties were periodically released by checks payable to Richard and mailed to petitioner's post office box (R. 99). The Superintendent of the Five Civilized Tribes requested no authority to make these payments from either the Secretary of the Interior or the Commissioner of Indian Affairs, and no such authority was ever given (R. 98, 99, 450, 1432). Petitioner had Richard endorse the checks and the proceeds were deposited in a bank subject to withdrawal by Richard until February 7, 1927; between that date and January 1, 1931, disbursements of these funds could be made only by Richard's checks when countersigned by petitioner. From January 1, 1931, until Richard's death in 1934, the checks were deposited by petitioner in his own insurance agency account, subject to withdrawal on his signature alone (R. 468–471). The amount released since November 9, 1925, exceeded $300,000 (R. 469, 472), and when Richard died all of the money had been expended (R. 938).

The trial court held the funds to have been illegally released, characterized the whole arrangement as "an attempt to substitute Mr.

House in the place of the Department in the supervision and handling of Eastman's restricted funds" (R. 102), ordered petitioner to account, and rendered judgment against him for the amounts he had collected as fees under his contract (R. 513). The judgment was affirmed in all material respects by the circuit court of appeals (R. 1439). A petition for rehearing was denied on September 21, 1944 (R. 1448).

ARGUMENT

1. Contrary to petitioner's assertions (Pet. 4, 5–6), we submit that the instant decision is not in conflict with *American National Bank* v. *American Baptist Home Mission Society,* 106 F. 2d 192 (C. C. A. 2). That case involved the release of certain funds for the express purpose of charitable donations. The purpose to which the funds were to be applied was fully set forth in contracts between the Indians and the Mission Society, which contracts were submitted to the Superintendent for the Five Civilized Tribes before release of the funds, and the checks, though issued in the names of the Indians, were turned over to the Mission Society, whose official secured the indorsement of the Indians and thereafter received the proceeds. Thus the Superintendent knew precisely the disposition to be made of the funds and knew that they were applied as intended. The court held that by implication under

Section 25, as amended, of the 1908 Regulations of the Secretary of the Interior (25 C. F. R. sec. 183.20, *supra,* pp. 4–6), the Superintendent could release funds "for the benefit of" the Indians, and it expressly found that the purposes for which the funds were released were beneficial to the Indians (106 F. 2d at p. 198). Furthermore, the transactions there took place before the promulgation of the 1925 regulation (*supra,* p. 7) which is controlling here. (See p. 12, *infra.*) And the Second Circuit apparently did not have before it (Pet. 5) the 1920 Act (*supra,* pp. 3–4) or the opinion of November 4, 1921, of the Solicitor of the Department of the Interior.[1] (See pp. 12–13, *infra.*)

In the case at bar a different situation is presented. As petitioner concedes (Pet. 3), the Superintendent, without authority from the Secretary of the Interior (much less from the Commissioner of Indian Affairs), released to Eastman Richard his restricted funds as they accrued.

[1] The Second Circuit mentioned (106 F. 2d at p. 197) as "the relevant statutory provisions" in the *Baptist Home Mission* case only Sections 1 and 2 of the Act of May 27, 1908, 35 Stat. 312, (*supra*, pp. 2–3). It did not deal with Section 2 of the 1913 Regulations (25 C. F. R. sec. 221.2, *supra*, pp. 6–7), which Section is pertinent here (see *infra*, p. 12), possibly because, unlike the instant case, that case did not involve payments to the Indians themselves to be used as they saw fit, or this Section may not have been brought to the court's attention. The Government was not a party in the *Baptist Home Mission* case.

There was no determination by the Superintendent of the purpose to which the money was to be applied, but instead a complete abdication by him of all supervision over the funds. The extent of the Superintendent's authority to pay moneys to the Indian for his own use is covered by Section 2 of the 1913 regulations of the Secretary of the Interior (25 C. F. R. sec. 221.2, *supra*, pp. 6–7), requiring approval by the Commissioner of Indian Affairs of all requests for release of funds "where it is intended to pay directly to the depositor [the Indian] for unrestricted uses" (R. 1336). The lack of authority in the Superintendent to pay to an Indian his restricted funds is also established by Section 29 of the Secretary's Regulations of 1925 (*supra*, p. 7) (R. 456, 1435). Those regulations incorporated an opinion by Mr. Booth, Solicitor for the Department of the Interior, dated November 4, 1921, holding that payments by the Superintendent of the Five Civilized Tribes to Indians themselves were not authorized by Section 18 of the Act of February 14, 1920 (*supra*, pp. 3–4), which directed the payment or rejection of "undisputed claims" without reference to the Department of the Interior. The Booth opinion appears at R. 454–456, and held that a request of the Indian for the whole or a part of his own funds was not an "undisputed claim" within the statute, which the Superintendent was authorized

to pay. That opinion has since been adhered to, as evidenced by an opinion of Mr. Gardner, then Solicitor for the Department of the Interior, dated October 20, 1942, which appears as the appendix to this brief (pp. 20–24).

It is not true, as petitioner states (Pet. 5), that the regulation[2] (Section 25 of the Secretary's Regulations of 1908, as amended, 25 C. F. R. sec. 183.20, *supra,* pp. 4–6) on which American *National Bank* v. *American Baptist Home Mission Society,* 106 F. 2d 192 (C. C. A. 2) rests, was not considered by the court below. That regulation, which appears at R. 485–486, was printed in full in petitioner's brief in the circuit court of appeals, and was relied upon by petitioner in that court. The conclusion of the circuit court of appeals that the Superintendent lacked authority to make the payments in this case does not rest upon the fact that all of the royalties were released, and its decision does not, as petitioner states (Pet. 5), hold that the result would be otherwise if only a portion of the royalties had been released. Rather, the decision rests upon the ground that the Superintendent is not authorized to remove an Indian from the sphere of

[2] Petitioner speaks of the "regulations" in the *Baptist Home Mission* case (Pet. 5). Evidently Section 25 of the 1908 Regulations, as amended (25 C. F. R. sec. 183.20, *supra,* pp. 4–6) is meant, for petitioner refers (Pet. 5) to these "regulations" as appearing at R. 485, and Section 25 is the only regulation at R. 485.

federal supervision and protection and nullify the protective function imposed by statute on the Secretary of the Interior with regard to these Indians and their property (R. 1436). As the appellate court said (R. 1435), "It [the *Baptist Home Mission* case] did not involve, as this case does, a relinquishment of all funds to the restricted Indian with permission for him to handle these funds free from any supervision by the Department."

2. Petitioner's contention (Pet. 4, 6–7) that the administrative and judicial interpretations of the Superintendent's authority are in conflict is not sustainable. In the courts below, in support of his contention that the Superintendent had authority to make the disbursements here involved, petitioner relied upon an opinion of February 7, 1919 (R. 452–454) by Mr. Mahaffie, Solicitor for the Department of the Interior, interpreting Section 18 of the Act of May 25, 1918, 40 Stat. 561, 579. That Section provided that "undisputed claims" for payment out of restricted funds of allottees should not be sent to the Secretary of the Interior for approval but should be approved, rejected or disapproved by the Superintendent. The Mahaffie opinion held that a request of an Indian for a part of his own funds was an "undisputed claim" within the meaning of that Act. The 1918 statutory provision was re-enacted in Section 18 of the Act of February 14, 1920,

(*supra,* pp. 3–4), and this provision was interpreted in an opinion of November 4, 1921, by Mr. Booth, the succeeding Solicitor. (The Booth opinion appears at R. 454–456.) After noting the previous Mahaffie opinion, Mr. Booth observed that a "claim," whether disputed or undisputed, "presupposes a third party in whose favor such claim is presented," and concluded that "A request or demand by the Indian himself for any part or all of his funds is not such a 'claim' as would bring the matter within the statute." This was clearly the correct interpretation of the law, as concluded by both the trial court and the circuit court of appeals (R. 475–476, 1434). As was stated by the trial court (R. 475), "A release of all royalties as received is in effect removal of restrictions. Only the Secretary of the Interior may remove restrictions." Section 1 of the Act of May 27, 1908 (*supra,* pp. 2–3); *Parker* v. *Richard,* 250 U. S. 235.

The interpretation of Section 18 of the 1920 Act in the Booth opinion was expressly incorporated by reference into Section 29 of the Regulations of 1925 promulgated by the Secretary of the Interior (*supra,* p. 7; R. 456); and, as appears from an opinion of October 20, 1942 of Mr. Gardner, then Solicitor of the Department of the Interior (Appendix, *infra,* pp. 20–24), that interpretation has been adhered to ever since.

Petitioner relies (Pet. 6) on the testimony of the witnesses Landman and Wilkinson (R. 488–503), the present Superintendent and Assistant Superintendent, respectively, of the Five Civilized Tribes Agency at Muskogee, Oklahoma. However, this testimony establishes, not that these witnesses interpreted the 1920 Act, but that both were aware of the plain language of the Booth opinion and, notwithstanding, followed the earlier Mahaffie opinion and so violated the law.

The contemporaneous construction of the 1920 Act by the Government officials "charged with the administration of the Indians' funds" was not, as petitioner urges (Pet. 7), ignored by the circuit court of appeals. The administrative interpretation of the Act is that of the Secretary of the Interior as embodied in the Booth opinion of 1921 and in the 1925 regulations reaffirming the Booth opinion; that interpretation has been uniform throughout the intervening years; it is the correct interpretation of the law, and was properly followed by the courts below.

3. Petitioner contends (Pet. 4, 7) that the decision of the circuit court of appeals will result in a flood of litigation. The decision has no such scope. It does not hold that moneys illegally released can be recovered from third persons who receive them from a restricted Indian without notice of the illegality of the release. Petitioner was not so situated. He procured from Richard a letter

addressed to the Superintendent of the Five Civilized Tribes Agency requesting that all of Richard's mail and checks be forwarded to the post office box of the petitioner (R. 1432, R. 1403–1404). This was not in terms a request for a release of all royalties. Nevertheless, the Superintendent immediately began to disburse Richard's royalty income as it accrued, sending the checks to petitioner's post office box (see Statement, *supra,* p. 9). Petitioner knew there had been no express request by the Indian for a release of all royalties, and he knew also that these funds were being disbursed without regard to the needs of the Indian and in ignorance and indifference on the part of the Five Civilized Tribes Agency officials as to the uses to which the money was being applied (R. 851). As a lawyer, petitioner admitted familiarity with Section 2 of the 1913 regulations (25 C. F. R. sec. 221.2, *supra,* pp. 6–7) requiring approval of the Commissioner of Indian Affairs for disbursements to Indians of this category for their unrestricted use (R. 701). The trial court properly characterized the whole transaction resulting in the release of the funds as an "attempt to substitute Mr. House in the place of the Department in the supervision and handling of Eastman's restricted funds" (R. 102). Even the Secretary of the Interior cannot, without a request by the Indian, abandon his protection of the Indian's restricted moneys. *Mott* v. *United States,* 283

U. S. 747, 751. Certainly the Superintendent has no such authority. It was in the light of these facts that the circuit court of appeals, after observing that petitioner was an attorney skilled in the law, held that "He knew as a matter of law that these funds were restricted and under the supervision of the Secretary of the Interior" (R. 1436). The Government did not here proceed against a recipient of the funds without notice, and the decision below does not warrant any such proceeding. House had actual knowledge of the circumstances of the release of the funds, actively participated in securing their release, knew the lack of authority in the Superintendent to make the disbursements, and therefore knew the releases were illegal. The decision below holds nothing more than that the United States may look to one so situated for restoration of any such moneys acquired by him.

4. Finally, petitioner asserts (Pet. 4, 7–8) that the decision below goes further than prior adjudications. The decision is no broader than those of this Court in *Mott* v. *United States,* 283 U. S. 747, and *United States* v. *Noble,* 237 U. S. 74; see also *United States* v. *Moore,* 284 Fed. 86 (C. C. A. 8); *McGugin* v. *United States,* 109 F. 2d 94 (C. C. A. 10); *Barnett* v. *Equitable Trust Co.,* 21 F. 2d 325 (S. D. N. Y.). In those cases the Government was allowed to follow restricted funds in the hands of persons taking with notice.

CONCLUSION

The questions presented were correctly decided by the court below. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1944.